U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 1 4 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(ii), as an alien physician. The petitioner asserts that he is an alien physician who has agreed to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals. The director found that the petitioner had not provided an employment contract complying with the regulatory requirements.

On appeal, counsel asserts that the director applied the wrong regulatory provisions. While we concur with counsel that the director erred in concluding that all employment in an underserved area must occur after the petition is approved, we find that the director correctly concluded that the employment contract submitted does not meet the petitioner's evidentiary burden.

Section 203(b) of the Act, as amended, provides:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.
> >
> > > (ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--
> > >
> > > > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
> > > >
> > > > (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The regulation at 8 C.F.R. § 204.12(c) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit the following evidence:

> (1)(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.

The regulation at 8 C.F.R. § 204.12(b) provides:

> (b) Is there a time limit on how long the physician has to complete the required medical service?
>
> > (1) If the physician already has authorization to accept employment (other than as a J-1 exchange alien), the beneficiary physician must complete the aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date of approval of the Form I-140.
> >
> > (2) If the physician must obtain authorization to accept employment before the physician may lawfully begin working, the physician must complete the aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date of the Service issues the necessary employment authorization document.

The commentary at 65 Fed. Reg. 53889 (2000) provides:

> In general, the alien's 5-year or 3-year period of medical service begins when the alien starts working for the petitioner in a medically underserved area. If the physician, other than those with J-1 nonimmigrant visas, already has authorization to accept employment at the facility, the 6-year or 4-year period during which the physician must provide the service begins on the date that the Service approves the Form I-140 petition and national interest waiver. If the physician must obtain employment authorization before the physician can begin working, the 6-year or 4-year period begins on the date the Service issues an EAD. Since section 203(b)(2)(B)(ii)(II) of the Act specifically prohibits any time served in J-1 nonimmigrant status as counting towards the 5-year service requirement, J-1 physicians with approved Form I-140 petitions will have their medical service under this rule begin on the date the physician starts his or her employment with the petitioner, and after the Service issues an EAD.
>
> The interim rule does include a special provision for former J-1 nonimmigrant physicians who have obtained foreign residence requirement waivers. Section 214(1) of the Act, as previously amended by section 220 of Public Law 103-416, provides a special waiver of the foreign residence requirement for alien physicians who are willing to work at VA facilities or in HHS-designated underserved areas. Under section 214(1), 3 years' service as an H-1B nonimmigrant is sufficient. The interim rule makes clear that for aliens who already have a

> waiver under section 214(1) of the Act, the Service will calculate the 5-year or 3-year period of services of the national interest waiver under section 203(b)(2)(B)(ii) of the Act beginning on the date the alien changed from J-1 to H-1B status. That is, an alien who is subject to the foreign residence requirement will not be required to first serve for 3 years to obtain that waiver and then to serve an additional 5 years to obtain adjustment of status based on the national interest waiver.

Finally, 8 C.F.R. § 245.18(e) provides:

> *When does the Service begin counting the physician's 5 -year or 3 -year medical practice requirement?* Except as provided in this paragraph, the 6-year period during which a physician must provide the required 5 years of service begins on the date of the notice approving the Form I-140 and the national interest waiver. Alien physicians who have a 3-year medical practice requirement must complete their service within the 4-year period beginning on that date.
>
> > (2) If the physician formerly held status as a J-1 nonimmigrant, but obtained a waiver of the foreign residence requirement and a change of status to that of an H-1B nonimmigrant, pursuant to section 214(1) of the Act, as amended by section 220 of Public Law 103-416, and § 212.7(c)(9) of this chapter, the period begins on the date of the alien's change from J-1 to H-1B status. The Service will include the alien's compliance with the 3-year period of service required under section 214(1) in calculating the alien's compliance with the period of service required under section 203(b)(2)(B)(ii)(II) of the Act and this section.

Initially, the petitioner submitted an employment contract dated October 1, 1998 and a separate addendum dated December 18, 2002. The initial employment contract has original initials and signatures on it. It purports to be dated October 1, 1998 and Article 1 asserts that the employment will commence "October, 1998" and continue during the "Term of Employment" as defined in Article 5.1. Article 5.1, however, defines "Term of Employment" as the twelve-month period beginning July 1, 2002 and two subsequent twelve-month periods. The contract purports to be signed by the petitioner on October 1, 1998 and the employer on September 24, 2002. The petitioner also submitted evidence that he changed his nonimmigrant status from J-1 to HI B1 on October 1, 1998.

On October 30, 2003, the director requested a "valid contract between the [petitioner] and his employer indicating the conditions and dates through which he will be employed." In response, counsel asserted that the petitioner had already completed his five years of employment in an underserved area and need not provide a new contract. The petitioner submits copies of the relevant regulations and Federal Register commentary.

The director concluded that the period in which to complete the five years of employment begins upon approval of the Form I-140 petition or when employment authorization is issued and that the petitioner had not submitted evidence that he would work in an underserved area for five years after approval of the Form I-140. The director further concluded that the petitioner "has not submitted a full-time employment contract for the required period of clinical medical practice."

On appeal, counsel asserts that an alien physician can include employment in an underserved area beginning on the date he changes from J-I nonimmigrant status to HI B1 nonimmigrant status towards his five years.

Counsel's interpretation is consistent with the Federal Register commentary quoted above and the regulation at 8 C.F.R. § 245.18(e)(2) also quoted above. Thus, the director erred in concluding that all five years of employment must be conducted after the approval of the petition.

Nevertheless, while the director did not cite the discrepancies in the contract purportedly dated October 1, 1998, we concur with the director's ultimate conclusion that the record lacks a valid employment contract for the requisite period. Even if we ignored the fact that the 1998 contract is dated more than six months prior to the filing date of the petition, the contract only covered three twelve-month periods,[1] not the full five years. Assuming the contract is, in fact, a 1998 contract as claimed and that the 2002 dates are in error, the petitioner did not submit a renewal dated 2001. More significantly, the preprinted terms of the contract are internally inconsistent, indicating that the term of employment covered in the contract commenced both in October 1998 and July 2002. Further, a contract signed by an employer in 2002 cannot be considered a valid employment contract entered into in 1998.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistencies in the employment contract allegedly from 1998. Thus, the petitioner has not submitted a credible employment contract. Moreover, these inconsistencies reduce the credibility of other documentation submitted.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

[1] It is not clear which three twelve-month periods are covered by the contract as it contains inconsistent dates.